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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 CASSANDRA SHIH,

4 Plaintiff,

5 v.

18 Civ. 5495 (JFK) (BCM)

6 PETAL CARD, INC., et al.,

7 Defendants.

Remote Argument

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8 August 17, 2021  
9 11:12 a.m.

10 Before:

11 HON. BARBARA MOSES,

Magistrate Judge

12 APPEARANCES

13 BOIES SCHILLER FLEXNER LLP

14 Attorneys for Plaintiff

15 BY: MARILYN C. KUNSTLER, ESQ.

KATHERINE ZHANG

16 DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, L.L.P.

Attorneys for Plaintiff

17 BY: PETER S. DAWSON, ESQ.

18 ALSTON & BIRD LLP

Attorneys for Defendants

19 BY: JOANNA C. HENDON, ESQ.

KELLEY C. BARNABY, ESQ.

20 SCOTT M. O'BRIEN, ESQ.

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(Case called)

THE LAW CLERK: Counsel, please state your appearances for the record, beginning with plaintiff.

MS. KUNSTLER: Good morning, your Honor. This is Marilyn Kunstler, K-U-N-S-T-L-E-R, on behalf of the plaintiff.

THE COURT: Good morning.

MS. KUNSTLER: And I'm joined by two colleagues. Mr. Dawson?

MR. DAWSON: Good morning, your Honor. My name is Peter Dawson, also for the plaintiff.

THE COURT: Good morning.

MS. KUNSTLER: And your Honor, I will introduce our colleague, Katherine Zhang, from Boies Schiller Flexner. She is not yet admitted but has been assisting on the case.

THE COURT: Good morning, Ms. Zhang, and welcome to the Southern District of New York. I am sure you will be admitted promptly. Where are you in the process?

MS. ZHANG: I have a swearing-in ceremony for the New York State bar this week and then I'll be completing my application for the Southern District after that.

THE COURT: Okay. Excellent. So next time I see you, you will in fact be a member of the bar.

Now speaking of members of the bar, which seems to be a topic of conversation today -- oops. I'm sorry. Defense counsel, I didn't mean to forget you.

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1 MS. BARNABY: Thank you, your Honor. Kelley Barnaby  
2 on behalf of the defendants Petal Card, Andrew Endicott, and  
3 Jason Gross, and I'm joined by my colleagues Joanna Hendon and  
4 Scott O'Brien.

5 THE COURT: Who I can't see, and I take it that means  
6 that, Ms. Barnaby, that you have the speaking role today.

7 MS. BARNABY: Correct, your Honor.

8 THE COURT: All right. So welcome to all counsel. I  
9 will remind you all that since we are on -- not a Zoom call  
10 exactly, a video call, nonetheless, it's helpful if you mute  
11 your mic when you're not speaking to cut down on background  
12 noise. It's also extremely helpful if you unmute your mic when  
13 you are speaking because I'm not that good a lip reader.  
14 Please try not to speak over one another unless you lose audio  
15 or lose video, then you should speak up promptly so that we can  
16 fix the problem, if possible.

17 I hear a hiss on the line at the moment. I'm not sure  
18 exactly where it's coming from.

19 (Discussion off the record)

20 THE COURT: All right. So as I was saying, try not to  
21 speak over one another, and keep in mind that this is a public  
22 court hearing. There may be members of the public or the press  
23 listening in on our audio line.

24 For all participants, whether you are before the bar,  
25 so to speak, virtually speaking, or if you are a member of the

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1 public or press, please remember, just as if you were in my  
2 courtroom here in the Moynihan courthouse, you are not  
3 permitted to make any audio or video recordings of this  
4 proceeding at home, nor are you permitted to rebroadcast the  
5 proceedings without the Court's permission, which has not been  
6 given.

7 Now speaking of members of the bar, what we have  
8 before us today are two motions, one by the plaintiff and one  
9 by the defendant, each of which challenges certain privilege  
10 designations by the opposing party, which are made in whole or  
11 in part on grounds that the attorney-client privilege and/or  
12 the work product doctrine both raise the interesting and often  
13 difficult question of when somebody with a law degree is or is  
14 not acting as an attorney for privilege purposes.

15 I would actually like to start, if I could, with the  
16 motion filed at Docket No. 177, which is the plaintiff's motion  
17 to compel production of documents that the defendant has  
18 withheld on privilege grounds.

19 Whoever just turned something off, that was great.  
20 The hiss went away. It was Mr. Dawson, wasn't it?

21 MR. DAWSON: Yes, it was, and what's interesting is, I  
22 believe that I unmuted myself, because I was anticipating that  
23 this was what I was going to speak on, and so that may explain  
24 the hiss.

25 THE COURT: Well, let's just keep it the way it is

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1 right now because I can hear everybody very well.

2 In any event, in Motion No. 177, the plaintiff  
3 challenges certain privilege designations by the defendant and,  
4 in particular, challenges the withholding and/or redaction of  
5 certain documents on privilege grounds where that privilege  
6 designation is based on the status of Mr. Gross as not just a  
7 member of the bar but as the "general counsel" for the  
8 defendant or its predecessor entity.

9 So I know it's the plaintiff's motion, but whose  
10 motion is this on behalf of the defendants? Ms. Barnaby?

11 MS. BARNABY: I'll be speaking on this motion.  
12 Obviously were responding to Mr. Dawson's motion about whether  
13 Mr. Gross was serving in that role as counsel, and here we  
14 think that the contemporaneous facts and the testimony by way  
15 of declaration that we've submitted meet our burden to  
16 demonstrate Mr. Gross's participation and role as counsel for  
17 the company.

18 THE COURT: Well, let me ask you a few questions, if  
19 you don't mind, to set the stage --

20 MS. BARNABY: Absolutely.

21 THE COURT: -- for us. I see from Mr. Gross's  
22 declaration, which is at Docket No. 178-1, and which is very  
23 short, that he graduated from law school in 2012, that he was  
24 admitted to the bar of the State of New York in 2013, but that  
25 he voluntarily retired from the bar in July of 2017, which was

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1 a year and a half before somebody else came in as general  
2 counsel of the defendant corporation, now known as Petal,  
3 P-E-T-A-L. So for what period of time, Ms. Barnaby, is  
4 Mr. Gross claiming that some of his communications with other  
5 Petal executives are privileged?

6 MS. BARNABY: As has been stated in our log, it's from  
7 the period of 2015 to 2017.

8 I would also like to make a quick note that in  
9 preparation of his declaration, he was determining when exactly  
10 the new general counsel came on board, and it turns out that  
11 she was hired in December of 2017, on-boarded in January of  
12 2018, and in revising the declaration, you see that there was,  
13 as an end result, a typographical error which merged sort of  
14 those two periods, to the December 2018, but Ms. Wolf was hired  
15 in December 2017 and on-boarded in January 2018.

16 But really, for purposes of the log, what we're  
17 focused on is the period of 2015 and 2016. We did want to be  
18 clear about when his role with the company was as this in-house  
19 counsel role and so acknowledge in the declaration that that  
20 continued until he retired his New York law license in the  
21 summer of 2017, but for purposes of the log in particular, the  
22 entries are in 2015 and 2016, well within that period in which  
23 he was a member of the bar and acting as in-house counsel to  
24 the predecessor entity and the entity that becomes Petal.

25 Now --

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1 THE COURT: So you have not withheld anything after he  
2 resigned from the bar.

3 MS. BARNABY: We have not withheld communications,  
4 responsive relevant communications where he would be the only  
5 person that would potentially serve as an attorney.

6 THE COURT: Yes. You put that more precisely than I  
7 did. Thank you. You have not withheld anything predicated on  
8 Mr. Gross's status as an attorney to the company after he lost  
9 his license, or gave up his license.

10 MS. BARNABY: Correct.

11 THE COURT: Okay. Next question: What documents can  
12 you point me to, if any, in which Mr. Gross held himself out or  
13 the company Petal held him out as its counsel to the public;  
14 not internally, not drafts, but to the public, or to  
15 regulators?

16 MS. BARNABY: Well, your Honor, we submit that that --  
17 I don't believe that that is exactly the test, about whether  
18 it's the public at large, but the case law talks about publicly  
19 to the client, whether the attorneys held themselves out  
20 publicly to the client -- here, that would be Petal -- but also  
21 note that in --

22 THE COURT: Wait. I'm sorry. I'm not sure what you  
23 mean. What do you mean publicly to the client? You mean he  
24 told the client that he was acting as its attorney?

25 MS. BARNABY: Correct. Well, the case law does not --

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1 I did not see anywhere in the case law that says that there has  
2 to be a statement to the broad, full public.

3 What we do have here, though, are communications  
4 beyond just the company itself. He's identified in a contract  
5 where the notice is to the general counsel at his home address,  
6 and I understand that it's a draft due diligence questionnaire,  
7 but that is also in connection with representations to entities  
8 outside of the company.

9 THE COURT: So let me just make sure I'm following  
10 along at home here. Attached to your -- well, not attached,  
11 actually. The draft due diligence questionnaire appears to be  
12 attached to the reply brief; is that right?

13 MS. BARNABY: Yes.

14 THE COURT: That's the document you're talking about?

15 MS. BARNABY: Yes.

16 THE COURT: And was it ever sent to anybody outside of  
17 the company? Was it sent to TAB Bank in final form?

18 MS. BARNABY: I have not seen the final form that was  
19 submitted.

20 THE COURT: Okay. And I do note that it identifies a  
21 law firm that serves as legal counsel for the company, not  
22 Mr. Gross, right? That's not him.

23 MS. BARNABY: Well, Mr. Gross did hire and manage  
24 legal counsel to advise the company as well, just as is common  
25 in many in-house legal relationships with the clients. He both



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1 provided advice and engaged with outside counsel provided to  
2 the company.

3 THE COURT: Okay. You're telling me that, but that's  
4 not in his declaration. Where in this questionnaire is the  
5 part where you say it supports his role as counsel?

6 And Mr. Dawson, don't get too excited when you hear me  
7 ask where the evidence is, because when we get to your motion,  
8 that's going to be a significant issue.

9 MR. DAWSON: I'm just following along. I'm not  
10 getting excited. I'm --

11 THE COURT: All right.

12 MS. BARNABY: I apologize. I have missed the  
13 highlighting on my own document so I'm not getting it quickly,  
14 but I will get it from my co-counsel here momentarily.

15 THE COURT: Okay. So we have the draft due diligence  
16 questionnaire which right now you haven't hooked up; that is,  
17 we haven't established that it actually was sent in this form  
18 or in some similar form to anybody, right?

19 MS. BARNABY: Yes. And your Honor, I can direct you  
20 to the page. The Bates stamp is 122208, and --

21 THE COURT: For some reason there's no Bates stamping  
22 on the document in the form in which I received it.

23 MS. BARNABY: Huh. Well, it is in response to  
24 Question F.1. I'm not sure what happened there. When I  
25 printed from the docket, the stamp is on there, but --

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1 THE COURT: I found it. That's all right. Never  
2 mind. It says, "Currently Jason Gross serves as our General  
3 Counsel. He is a member of the New York State Bar." Got it.  
4 All right. But you haven't established that this actually got  
5 sent out. So what's next? What else have you got?

6 MS. BARNABY: We also have the second communication --  
7 sorry, the -- there is also a document in the production that  
8 is not attached that identifies Mr. Gross as the general  
9 counsel by way of his address, and we identified that to  
10 plaintiff --

11 THE COURT: Identified him as counsel by way of his  
12 address; in other words, his name isn't in the document but it  
13 says that legal notices should go to his house?

14 MS. BARNABY: Correct. As both the general counsel  
15 and his home address.

16 THE COURT: Ah, so it has the title "General Counsel."

17 MS. BARNABY: Correct.

18 THE COURT: And then his home address. So the general  
19 counsel could be anybody living in his house -- his spouse, his  
20 mother-in-law -- in theory.

21 MS. BARNABY: In the broadest theory, yes. He was the  
22 only participant in the company at that time living at that  
23 address. And I think really here, remembering that these are  
24 early stages of an early-stage company and so they are working  
25 through the process of establishing all of that formality, but

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1 he was participating in that role, and we have contemporaneous  
2 evidence of that supported by his testimony via the  
3 declaration.

4 THE COURT: Well, so turning to his testimony via the  
5 declaration, that's Exhibit A to your August 2nd letter brief,  
6 right?

7 MS. BARNABY: Yes.

8 THE COURT: Okay. So it is, as I said, very short.  
9 Now short is often a virtue. I don't mean to criticize short  
10 declarations, at least not generically speaking, but I am  
11 struck by the fact that the meat of it, so to speak, is two  
12 sentences in paragraph 3, where Mr. Gross says that he acted as  
13 general counsel and provided legal advice to the company that  
14 eventually became Petal and to its employees and co-founders,  
15 and "I also determined when to engage outside counsel for the  
16 company and who to engage." That's pretty vague, and that  
17 doesn't give me any insight into why the documents that were  
18 withheld or redacted fell within the privilege. In other  
19 words, we have here the classic and difficult situation of a  
20 man who wore at least two hats, correct? He had business as  
21 well as legal responsibilities. And when a senior executive  
22 has both business and legal responsibilities, it does get  
23 murky, and a decision has to be made on a document-by-document,  
24 communication-by-communication basis. He may have 27  
25 conversations during the day with his business hat on and five

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1 minutes of one with his legal hat on, and the proponent of the  
2 privilege has to establish that those particular five minutes  
3 are privileged. So is there any way to do this other than  
4 making me read all of the redacted or withheld communications?

5 MS. BARNABY: Well, your Honor, the fundamental issue  
6 we saw plaintiffs taking with our log was that they just simply  
7 didn't believe that he even had a role as counsel to the  
8 company, that they were rejecting the idea that he was counsel  
9 to the company under any circumstance, and that's what we have  
10 established, we believe, with competent evidence here.

11 THE COURT: Well, I'm not so sure about that. And I'm  
12 sure you know, because people tend to Google their magistrate  
13 judge's opinions, this is an issue that I addressed relatively  
14 recently in the *Charlestown Capital* case, where I noted, among  
15 other things, that the uncorroborated assertion of an  
16 individual himself that he was acting as counsel generally is  
17 not enough.

18 MS. BARNABY: Well, and that's why we identified the  
19 documentation as well, because we understand that it is helpful  
20 to see that there is the simultaneous representation in  
21 historical time point. I think here, as demonstrated on our  
22 log and the meticulous nature by which we have approached this  
23 issue, that we have not established or claimed a blanket  
24 privilege over all communications between Mr. Gross and others  
25 at the company in the log. In fact, in many, many situations

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1 instead we've redacted instances, and plaintiff claims in their  
2 letter briefing that they believe that those were for purposes  
3 of discussing regulatory compliance and incorporation issues,  
4 which are actually the -- I'm getting a bad network quality  
5 notice, so I just want to make sure that I'm still being heard.

6 THE COURT: I can hear you. More importantly, can our  
7 court reporter still hear you?

8 THE REPORTER: Yes, I can hear you fine. Thank you.

9 THE COURT: Great. You're good to go, Ms. Barnaby.

10 MS. BARNABY: Okay. So my point is that the log and  
11 our careful redaction, particularly on the issues that  
12 Mr. Dawson is claiming are the reasons that the redacted  
13 documents are in question, are the core types of advice that is  
14 provided from an in-house legal counsel -- regulatory  
15 compliance, formation of entity documents -- and that is the  
16 role, and we separated out those instances, and similarly  
17 produced a number of documents in whole that involved Mr. Gross  
18 or involved others. This isn't a matter of blanket assertion  
19 of privilege but actually was the result of thoughtful  
20 application and determination of when he had his attorney hat  
21 on and when he had his business hat on.

22 THE COURT: Okay. Mr. Dawson, it is your motion.

23 MR. DAWSON: Yes, it is.

24 THE COURT: You may proceed.

25 MR. DAWSON: Well, I suppose I would start with the

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1 point that Ms. Barnaby made a few moments ago, which is that  
2 this is the early stages of an early-stage company. The  
3 majority of the communications that we're targeting now are  
4 addressed to the early stages of an early-stage company, and  
5 what we have is two partners, both of whom happen to be  
6 attorneys -- Mr. Endicott and Mr. Gross. And what --

7 THE COURT: Wait. Don't tell me that Mr. Endicott  
8 also went to Harvard. My alma mater is getting a rough ride.

9 MR. DAWSON: He did indeed.

10 THE COURT: Oh.

11 MR. DAWSON: I believe they were law school friends.  
12 And I'm just seeing the network sort of -- I'm having maybe the  
13 same issue Ms. Barnaby was having, so I'm going to slow down  
14 and make sure that I'm being heard here.

15 THE COURT: I can hear you.

16 MR. DAWSON: Okay. And the concern we have is, these  
17 communications are two partners developing a company, not one  
18 partner designated as the in-house or general counsel and the  
19 other going to him for legal advice. There's no context  
20 suggesting the latter in anything we've seen. The defendants  
21 produced 90,000 pages of documents, and none of them so much as  
22 suggest that Jason Gross was in-house counsel for this company  
23 at any time, much less for the two-and-a-half-year period that  
24 they're claiming that he served as in-house counsel. None of  
25 the non-parties produced documents reflecting that. The

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1     LinkedIn bio for Mr. Gross never reflected that, nor did his  
2     signature line. And then if you look at the context, for  
3     instance, of the redacted documents, they don't suggest that  
4     something's redacted because it's for legal advice. There's no  
5     "Privileged and Confidential" legends on anything.

6             THE COURT: Now how can I look at those redacted  
7     documents? Did anybody give them to me?

8             MR. DAWSON: No. I mean, we observed that in the  
9     redacted documents that we saw, it did not appear to us that  
10    anything was redacted. There's no discussion of, you know,  
11    "Turning now to the legal matters," or anything like that in  
12    those documents. We did not put those in because we noted from  
13    the last conference, I believe, that we felt like your Honor  
14    might have steered us away from going down the road of *in*  
15    *camera* review and that sort of thing, so we wanted to be  
16    careful, you know, when we were going down that road.

17            THE COURT: *In camera* review is where I review the  
18    stuff that was withheld or the portions that were redacted.  
19    For future reference, it would not offend me if, in a situation  
20    like this, you wish to submit a few exemplars of redacted  
21    documents to show me what's been redacted.

22            MR. DAWSON: Right. And we would certainly be willing  
23    to do that. We were trying to keep the pages down. But I do  
24    appreciate that. Maybe that's something we should have done.

25            The subject matter of what's being redacted or what's

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1 being withheld is also striking to us. In late 2015, into  
2 2016, the issuance of stock, issues concerning the issuance of  
3 stock, that's what's at play in this case, and that's what's  
4 either being redacted or withheld. The regulatory discussion  
5 that Ms. Barnaby referenced is being withheld, and that's  
6 something that Mr. Endicott -- regulatory issues -- and  
7 Ms. Shih discussed early on.

8 But most significantly, we get to the communications  
9 between Mr. Endicott and Mr. Gross about the plaintiff and her  
10 claims, and this is what we're especially concerned about. And  
11 this gets back to who these people were and what they were  
12 doing at the early stages of the company. We have two old  
13 Harvard Law School buddies who joined together as partners to  
14 form this company, and we don't know when Mr. Gross first  
15 learned of Ms. Shih, and it may well have been February 16th  
16 when our complaint alleges that Ms. Shih wrote to Mr. Gross and  
17 Mr. Endicott and said, "CreditBridge was my business idea that  
18 I shared with you." And this is in the second amended  
19 complaint, your Honor, at paragraph 293. "We worked  
20 collaboratively on research, business models, and concepts, and  
21 discussed branding, investment opportunities, the division of  
22 responsibilities, and the possibility of bringing on specialist  
23 skills to perform tasks we could not manage ourselves. With  
24 the incorporation of CreditBridge, which had just been  
25 incorporated two weeks earlier, in Delaware, at the beginning



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1 of this month, the facts are no longer capable of bearing you a  
2 charitable interpretation. Your intent is clearly to cut me  
3 out of the business, which I conceived of and pursued in good  
4 faith with you and to which I am entitled to 50 percent  
5 ownership." And she sends that email to both Endicott and  
6 Gross on February 16, 2016, and it turns --

7 THE COURT: Let me interrupt you there, counsel. Her  
8 prior development of the concept on which she bases her lawsuit  
9 was with Endicott, not Gross, correct?

10 MR. DAWSON: That's correct, your Honor, yes.

11 THE COURT: So Gross came into the company that's now  
12 Petal later in the picture.

13 MR. DAWSON: Yes. What we think happened was this --  
14 and this is actually alleged in our second amended complaint.  
15 I will summarize. Endicott said to Gross, there's a law school  
16 friend of mine, I was thinking I might want to have him  
17 involved. Then there were discussions, and --

18 THE COURT: Endicott said to Gross?

19 MR. DAWSON: No. Endicott said to Ms. Shih.

20 THE COURT: Thank you.

21 MR. DAWSON: There's a law school friend of mine --

22 THE COURT: Meaning Gross.

23 MR. DAWSON: Yeah, we think meaning Gross. Now in  
24 retrospect, seeing what happened here, we think that was a  
25 reference to Gross. As it turns out, the documents we've seen

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1 in discovery SHOW that Endicott and Gross are talking about  
2 this CreditBridge idea in late June of 2015, right at the same  
3 time and right after Endicott had been working on it with Shih.  
4 Endicott took the project to Gross because Shih was not ready  
5 to bring on another early-stage founder. That's what we  
6 believe happened, and that's what the second amended complaint  
7 alleges. But we don't know what Endicott told Gross about  
8 Shih. We know what Endicott -- and this is what makes it very  
9 interesting. We know what Endicott told an early-stage data  
10 scientist who worked on the project about Shih, because that  
11 data scientist, Berk Ustun, the only other early-stage person  
12 we've been able to identify, asked, when he was sent their work  
13 product, the Endicott and Shih work product, he said: Who is  
14 Cassie? And Endicott's response was: Some chick, she's from  
15 New Zealand, it was her idea. So what did he tell --

16 THE COURT: We're getting a little far afield here,  
17 Mr. Dawson.

18 MR. DAWSON: My point is this: What did he tell  
19 Gross? And if February 2016 is the first time that Gross  
20 learned of Ms. Shih, was her role concealed by Endicott the  
21 entire time --

22 THE COURT: Sure. I get it. I get it. I get it.  
23 You want to see those February 16th emails, the redacted  
24 portions of them, because if it's your lucky day, you have  
25 Gross saying to Endicott: What the heck, man, why didn't you

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1 tell me about this chick from New Zealand, we're in trouble  
2 here, right?

3 MR. DAWSON: What the heck, what the heck is the exact  
4 discussion that I expect might have happened here. What the  
5 heck. These are -- not a legal discussion. What's interesting  
6 is this entry, this first entry on February 16, 2016, is not  
7 from Endicott to Gross seeking legal advice; it's from Gross to  
8 Endicott. What the heck? Or maybe it's --

9 THE COURT: Or, possibly, it's an email from Gross to  
10 Endicott saying: I see that you got essentially a  
11 prelitigation email from Ms. Shih. Let me now put on my legal  
12 hat and give you some advice.

13 MR. DAWSON: Theoretically, except again, we haven't  
14 seen anything that actually meets their burden of demonstrating  
15 he wore a legal hat. There's no document by which he held  
16 himself out to the public as wearing a legal hat, and all of  
17 these circumstances suggest he was not wearing a legal hat. I  
18 mean, there should be a myriad of examples, if he wore a legal  
19 hat on and off for two and a half years, that the defendants  
20 could bring to us to show, look, this is Mr. Gross acting as  
21 in-house counsel on this issue, and this is Mr. Gross acting as  
22 in-house counsel on that issue, and we don't have any of that  
23 here. So we don't believe it was a legal hat situation.

24 THE COURT: Okay. What else? Anything else? I'm  
25 just about ready to give you a ruling on this one.

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1 MR. DAWSON: You know, I don't think so, your Honor.  
2 I think that's it. We don't believe they met their burden, and  
3 that's the bottom line. It is their burden to demonstrate that  
4 Gross acted as in-house counsel, and we don't think they've  
5 done so here. This is all the makings of an after-the-fact  
6 arbitrary determination that's convenient for them now.

7 THE COURT: And how many documents were withheld on  
8 the basis of privilege derived from Gross? Is it just the  
9 excerpts that I have here before me?

10 MR. DAWSON: No, your Honor. We think there's -- I  
11 mean, there's two and a half years' worth, and at the very  
12 least the first 30 pages of their privilege log are withheld on  
13 that ground.

14 THE COURT: So you gave me excerpts, not the full  
15 picture of the Gross privilege claims.

16 MR. DAWSON: That's correct.

17 THE COURT: All right. Ms. Barnaby, do you have any  
18 brief response? I never really gave you the opportunity to  
19 give your full argument.

20 MS. BARNABY: Well, certainly we take issue with even  
21 the characterization that was spent some time on, what the  
22 fundamental issue here is. Fundamentally this is a litigation  
23 about whether plaintiff -- plaintiff having identified a  
24 potential problem, having mentioned it to a third party, and  
25 whether there was an oral contract and agreement to go into

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1 business together.

2 But setting that aside, really, on this point, I think  
3 that in our mind, the log demonstrates the exact point that  
4 Mr. Dawson questioned: Where is the evidence that over two and  
5 a half years Mr. Gross served as an in-house counsel, legal  
6 counsel to his client Petal, and worked with his co-executive  
7 as a lawyer? It's in the log. That's what we -- that's where  
8 you find those documents. That's the consistent communication  
9 there.

10 THE COURT: How many documents were withheld  
11 predicated on Gross's legal role?

12 MS. BARNABY: I do not have the exact count on me  
13 right now. I acknowledge that there are several pages covering  
14 2015 and 2016.

15 THE COURT: Well, I was given about four pages, and  
16 I'm trying to get a sense of how much else is out there that I  
17 haven't seen.

18 Mr. Dawson is shuffling through his papers. That's  
19 helpful. Thank you.

20 MS. BARNABY: I was also reminded, your Honor, that  
21 one of the contracts with an outside vendor -- there were  
22 actually two, not just one, and one includes Jason's email  
23 address as part of the notice of legal counsel, so again,  
24 Mr. Gross being identified specifically in that role.

25 THE COURT: Does it say "Jason Gross, General

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1 Counsel"?

2 MS. BARNABY: I believe in that instance, it includes  
3 his email address and is in the notice of counsel, but it's the  
4 other agreement at a similar time that identifies him as --  
5 identifies general counsel.

6 THE COURT: The other agreement. Sorry. You've lost  
7 me there.

8 MS. BARNABY: So short answer, I don't believe so. I  
9 believe there's a notice, legal notice goes to Jason Gross, in  
10 one agreement, and it's at his -- uses his email address with  
11 his name and his home address, and the other agreement says  
12 general counsel, identifying his home address --

13 THE COURT: But not his name.

14 MS. BARNABY: But not his name.

15 THE COURT: Okay. And Mr. Dawson, are you going to  
16 give me a page count now?

17 MR. DAWSON: It's the vast majority of the first 60  
18 pages of the log, except there are communications with outside  
19 counsel in there as well, so I would need to go and remove  
20 those, but largely the first 60 or so pages of the log are  
21 Gross, are withheld on the ground that Gross was the legal  
22 counsel for Petal. But --

23 THE COURT: So that's going to be what?

24 MR. DAWSON: I don't want to be overencompassing  
25 because there are communications by which Petal communicated

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1 with outside counsel that theoretically could be privileged  
2 and --

3 THE COURT: And which, more importantly, you are not  
4 challenging in the present motion.

5 MR. DAWSON: Correct. Correct.

6 THE COURT: Okay. All right. The proponent of the  
7 privilege does bear the burden of establishing all of the  
8 elements of the privilege through competent evidence. Both  
9 sides know this. Both sides quote to me various cases, some of  
10 them written by me, which say that.

11 With regard to the motion we are now discussing, the  
12 motion at Docket No. 177, plaintiff's motion, the defendant has  
13 made what I would characterize as a weak showing but not a  
14 completely non-existent showing that Mr. Gross was in fact  
15 acting, at least at times, with his attorney hat on with  
16 respect to the startup company. Consequently, I am not going  
17 to grant the motion to compel based on what is before me now.

18 Mr. Dawson, if you could turn your mic either on or  
19 off. I can't remember which way gives us better sound quality.  
20 That's it. There we go.

21 I reluctantly will accept a small sampling of  
22 documents to review, *in camera*, for the purpose of determining  
23 whether in fact there appears to be a basis for the privilege.  
24 I will permit the challenging party, in this case the  
25 plaintiff, to designate for me six -- count them, six --

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1 documents that you want the defendants to produce to me  
2 unredacted or in whole, if the document was wholly withheld,  
3 for my *in camera* review. Obviously you're going to pick the  
4 ones that you think are the sketchiest. I will permit the  
5 defendants to identify for me three -- count them, three --  
6 documents which the defendants contend provide a convincing  
7 demonstration that this guy had his lawyer hat on, at least  
8 some of the time.

9           So Mr. Dawson, if you could advise Ms. Barnaby what  
10 your six candidates are by the end of this week, by Friday; and  
11 then Ms. Barnaby, if you could email both Mr. Dawson's  
12 candidates and your own candidates -- and you should tell him  
13 by Bates number what your candidates are as well so both sides  
14 know what I'm looking at -- and then email all nine of them to  
15 me using my chambers email address, which, if you don't know  
16 it, my law clerk Ms. Baig will provide for you. I actually  
17 think if you look on the court website on my individual  
18 practices, I think it's listed there, although I can't  
19 remember. So use the email to send the unredacted or withheld  
20 documents for my *in camera* review.

21           I would like you all also, Ms. Barnaby, to file on ECF  
22 just a short letter confirming by Bates number that you have  
23 this day supplied to me *in camera* complete and unredacted  
24 copies of the following documents -- this, this, and this. I  
25 will get those on Monday. I will take a look at them.



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1 Hopefully that will give me enough information so that I can  
2 extrapolate to the rest of the documents and to issue a ruling.  
3 So we will not have final resolution of the plaintiff's motion  
4 today.

5 Shall we turn to the defendants' motion? The  
6 defendants' motion is at Docket No. 176. Whoever is hissing,  
7 please unhiss yourself. I see you're all muted at the moment.  
8 Mr. Dawson, why don't you unmute.

9 No, that wasn't it.

10 Ah, Ms. Kunstler.

11 MS. KUNSTLER: Your Honor, yes, this is Marilyn  
12 Kunstler, and I wanted to introduce the fact that I will be  
13 arguing this motion, since there are two motions before your  
14 Honor.

15 THE COURT: Sure.

16 MS. KUNSTLER: And I can mute or unmute as your Honor  
17 chooses.

18 THE COURT: Well, right now we have good sound  
19 quality, at least from my perspective. But that may change at  
20 any moment, in which case I'll let you know and we'll do  
21 something different.

22 And it's still Ms. Barnaby, correct, on this motion?

23 MS. BARNABY: That's correct, your Honor.

24 THE COURT: Okay. Interesting pattern seems to be  
25 developing. Whenever somebody turns their microphone on or

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1 off, the sound quality clears up, for a short period of time.  
2 Not being a technical person, I can't diagnose this in the  
3 least.

4 All right. With respect to motion 176, which was the  
5 defendants' motion, things are more complicated, because the  
6 individual that everybody is fighting about was at the  
7 beginning of the relevant period Ms. Shih's boyfriend and a law  
8 student. As I understand it, he then became Ms. Shih's husband  
9 in May of 2017 and was still a law student. That was of course  
10 a year or little more than a year before this case was filed.  
11 The case was filed in June of 2018.

12 In January of 2019, six months or so after the case  
13 was filed, Mr. Kauder, by now married to Ms. Shih, also became  
14 a member of the bar of the State of New York. Thereafter, I am  
15 told, in the April time period of 2019, he contacted the  
16 defendant entity in a manner which a lawyer for Ms. Shih would  
17 have been ethically prohibited from doing.

18 I am further told that two months after that, on  
19 June 24th of 2019, he was identified in a written engagement  
20 letter as one of Ms. Shih's lawyers. And then I'm told in the  
21 motion papers that I have now before me that in fact he was  
22 acting as her attorney from the moment he was admitted to the  
23 bar.

24 So I have a couple of fact questions, again, for  
25 plaintiff's counsel. I haven't seen, or if I have seen, I

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1 don't know where I have seen the June 24, 2019 engagement  
2 letter. Can somebody tell me if I have that and, more  
3 importantly, if he was already acting as Ms. Shih's counsel  
4 from the moment he was sworn in to the bar, what was the  
5 purpose of the engagement letter?

6 MS. KUNSTLER: Your Honor, this is Marilyn Kunstler,  
7 Boies Schiller Flexner, on behalf of the plaintiff. I do not  
8 believe that the June letter, which we have described as a  
9 consulting arrangement, has been provided to your Honor,  
10 although obviously we'd be happy to do that if your Honor would  
11 like to see it.

12 To your Honor's other question, yes, in our view --  
13 and I appreciate the chronology that you set out because we  
14 believe there are very bright-line demarcations here that  
15 describe the privileges that are available that apply to the  
16 plaintiff's communications with her husband that turn on those  
17 bright-line dates. And when he became admitted in January of  
18 2019, an admitted member of the bar, he was entitled to give  
19 legal advice and the plaintiff was entitled to seek and rely on  
20 legal advice from her husband, and the fact that they were  
21 married does not change that relationship. So as of June --  
22 pardon me -- January 2019, plaintiff and her husband had both a  
23 spousal relationship, which is continuous from the date of  
24 their marriage, and they had an attorney-client relationship,  
25 and there is nothing saying that those two privileges cannot

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1 coexist, particularly in two-way communications between the two  
2 of them. And it might be a good moment to just mention that  
3 what the defendants are after here are plaintiff's  
4 communications with her husband over a very long period of time  
5 relating to the litigation strategy and not the facts of the  
6 case. I want to make sure your Honor was clear about that,  
7 which you probably are.

8 THE COURT: Well, I think you mentioned that a few  
9 times in your letter brief, counsel.

10 MS. KUNSTLER: Exactly. So the answer to your  
11 question was that Mr. Dawson, who was litigation counsel at the  
12 time -- and of course he can speak if you'd like to hear from  
13 him on this -- did not have communications with his client,  
14 Ms. Shih, the plaintiff, that also included the spouse, when he  
15 was only a spouse and not yet a lawyer, only after he was  
16 admitted. When he was admitted in January of 2019, he then was  
17 an attorney capable of giving her legal advice, and after he  
18 had been admitted for six months, Mr. Dawson entered into a  
19 consulting agreement with Mr. Kauder, the husband.

20 THE COURT: But not as a consulting economist or as a  
21 consulting physician or as a consulting expert of some sort; as  
22 a consulting attorney, correct?

23 MS. KUNSTLER: That's correct, a consulting attorney.  
24 But let me also emphasize, Mr. Kauder has never been litigation  
25 counsel of record, and that's a very important distinction.

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1 THE COURT: Let's pause there and define some terms,  
2 because I think in the parties' letter briefs, there may be  
3 some fuzziness about the use of these terms. It is your  
4 contention, Ms. Kunstler, as I understand it, that Mr. Kauder  
5 was acting as Ms. Shih's attorney from the moment he was  
6 capable of acting as Ms. Shih's attorney, the moment he passed  
7 the bar.

8 MS. KUNSTLER: Yes.

9 THE COURT: But he was formally retained as a  
10 consulting attorney with regard to this litigation on June 24th  
11 of 2019 in a letter that I haven't seen, but that he was never  
12 litigation counsel of record, meaning that he was never on the  
13 docket of this action.

14 MS. KUNSTLER: Yes, your Honor, I believe that's  
15 correct, although I must admit the technology is causing me to  
16 lose some of your syllables. I don't know if anyone else is  
17 having an issue. Could be broadband on my end. But I believe  
18 that what you said is correct.

19 THE COURT: Okay. So you contend that he has been  
20 giving Ms. Shih advice, not just advice in general but advice  
21 about this case, since he was admitted to the bar, but that he  
22 is not litigation counsel of record, and you mean that in a  
23 technical sense, that his name is not on the docket here and  
24 he's not going to stand up in court before the judge or the  
25 jury with respect to this litigation, correct?

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1 MS. KUNSTLER: That is correct.

2 THE COURT: All right. Now what changed, if anything,  
3 on June 24, 2019? This is what I am struggling with. If he  
4 was already acting as her lawyer, which people do without  
5 engagement letters -- Mr. Gross alleges he did for years, for  
6 example -- if he was already acting as her lawyer, what changed  
7 on June 24, 2019, and why was it even necessary?

8 MS. KUNSTLER: Your Honor, if you'd like to hear from  
9 Mr. Dawson, who was a party to that engagement letter, he is  
10 ready to speak to that issue. In my opinion --

11 THE COURT: No. I'm not taking testimony today.  
12 Mr. Dawson could have put in a declaration; he didn't. So let  
13 me hear from you, Ms. Kunstler.

14 MS. KUNSTLER: All right. I will tell you. First of  
15 all, I view it as a belt and suspenders, okay? After that  
16 point, they had a formal acknowledgment that Mr. Kauder was  
17 both a consulting lawyer, a consulting attorney, and Ms. Shih's  
18 husband. But the nature of the relationship and the  
19 communications with Mr. Dawson turned not on his status as a  
20 spouse but on his status as an attorney. That's point one.

21 And point two is it allowed him to look at  
22 confidential documents that have restrictions under the  
23 confidentiality stipulation in the record, and Mr. Dawson can  
24 correct me or we can correct you later if I'm wrong about that.

25 THE COURT: So I don't remember off the top of my head

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1 what the wording of the confidentiality order, the protective  
2 order is in this case. Are you saying, Ms. Kunstler, that  
3 until there was a piece of paper that said he was a consulting  
4 attorney, it was the belief in your camp that you couldn't show  
5 him attorneys' eyes only documents?

6 MS. KUNSTLER: I think I would correct that slightly,  
7 your Honor, to say it was a belt and suspenders. It was to  
8 avoid any question, to make sure it was documented that he  
9 could see the confidential documents.

10 THE COURT: So ever since then attorneys' eyes only --  
11 and when we say confidential documents, confidential documents  
12 in a two-tiered order generally can go to the client, but  
13 attorneys' eyes only documents cannot go to the client, they  
14 can only go to -- typically, it's going to be counsel of record  
15 in this litigation. Can you be a little more specific about  
16 what Mr. Kauder got and didn't get, both before and after  
17 June 24, 2019?

18 MS. KUNSTLER: Your Honor, I actually believe it is  
19 the documents that the client could see. Mr. Dawson is nodding  
20 his head. It's the documents the client could see. We did not  
21 rely on attorneys' eyes only for that agreement. It was to  
22 make sure that there could be no question down the road. And  
23 this was about the time documents started to be produced. That  
24 is really the precipitating event.

25 THE COURT: So documents produced by the defendants,

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1 to the extent Ms. Shih could see them, starting on June 24th,  
2 Mr. Kauder could see them as well.

3 MS. KUNSTLER: That's correct.

4 THE COURT: And before that he couldn't?

5 MS. KUNSTLER: Well, I think before that there really  
6 hadn't been much in the way of a production so it hadn't been  
7 an issue, and I think it was, as I keep repeating the phrase,  
8 belt and suspenders. It was to make sure there would be no  
9 question about his ability to see those documents.

10 THE COURT: Mm-hmm, because if he was just her husband  
11 and not her attorney, there would be some questions.

12 MS. KUNSTLER: Well, I actually think there probably  
13 wouldn't be, because I do believe they had an attorney-client  
14 relationship, as I've said, but this was to make sure there  
15 could be no question.

16 THE COURT: All right. Now about that attorney-client  
17 relationship, before it was formalized in this consulting  
18 agreement, as we just discussed with regard to the  
19 counter-motion, the fact that somebody is a lawyer doesn't mean  
20 they're always acting as a lawyer, particularly when they have  
21 some other relationship to the party, whether it is as business  
22 partner, which was the situation 10 minutes ago, or as husband,  
23 which is the situation here. What admissible evidence have you  
24 offered that, particularly prior to June 24, 2019, Mr. Kauder  
25 had his attorney hat on and not his husband hat on, or in your



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1 view, does it not matter because one way or the other, the  
2 communications are confidential and privileged?

3 MS. KUNSTLER: Your Honor, I believe the answer, if I  
4 understood your question correctly -- and I want to make sure I  
5 am answering the right question. I believe what you asked me  
6 is: With regard to communications after January of 2019, when  
7 he was formally admitted, what is the evidence that would show  
8 that they had an attorney-client relationship at that point in  
9 time. Fair?

10 THE COURT: Correct.

11 MS. KUNSTLER: Thank you.

12 THE COURT: Sure. Because we saw that as an issue  
13 with Mr. Gross, and as you know, even though there was a  
14 declaration, I wasn't that impressed by the declaration. So  
15 what have you got?

16 MS. KUNSTLER: I would say that this situation differs  
17 from the Gross situation in two respects: (1) as a matter of  
18 law, a spouse is entitled to rely and has an implied  
19 attorney-client relationship with another spouse, and we have  
20 actually cited cases --

21 THE COURT: I'm sorry. You didn't mean that, did you,  
22 that a spouse has an implied attorney-client relationship with  
23 another spouse just because the spouse happens to be a lawyer?

24 MS. KUNSTLER: I believe we've cited cases that  
25 actually support that point. That's point one. So there are

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1 legal authorities that support that relationship. But point  
2 two --

3 THE COURT: So the undisputed fact that he was a  
4 spouse and a lawyer -- which I take to be an undisputed fact,  
5 that he was admitted to the bar and that he's actually married  
6 to her.

7 MS. KUNSTLER: Correct.

8 THE COURT: I don't hear anybody disputing those  
9 facts. You think that those two facts, once undisputed, give  
10 you a presumption that he was acting with his attorney hat on?

11 MS. KUNSTLER: Well, that in addition to -- well, I  
12 think that is a fair basis to start with, that there can be an  
13 implied relationship, and we give the factors, including  
14 gratuitous legal services that are being provided, based on a  
15 relationship other than a paying relationship, or a formal  
16 engagement, as one of the factors to finding that there is in  
17 fact an attorney-client relationship. And we cite that in --

18 THE COURT: Then what the heck was he doing calling up  
19 Petal Card?

20 MS. KUNSTLER: I will address that in a moment.

21 And the second piece of evidence, your Honor -- I will  
22 say, if your Honor would like to see it, we can provide an  
23 affidavit -- it's clear, again, picking up a point the  
24 defendant just made, based on our log, that the client, our  
25 client, Ms. Shih, was relying very heavily, even before he was

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1 admitted, on his advice. He's a trusted advisor to her even  
2 before he was admitted. There really is no question that she  
3 considered herself to have an attorney-client relationship with  
4 her husband that became an official attorney-client  
5 relationship as of January 2019, and we'd be happy to provide  
6 an affidavit if your Honor would like to see that.

7 THE COURT: The time for that has kind of come and  
8 gone.

9 MS. KUNSTLER: Well, we think that the  
10 circumstances -- the evidence that's already in the record  
11 shows the level of her reliance on him for legal advice.

12 THE COURT: All right. Let me back up. I'm sorry.

13 MS. KUNSTLER: I know there was a question that you  
14 asked that I didn't answer, and I apologize. Would you mind  
15 repeating the question. I want to answer it correctly.

16 THE COURT: Well, the second part of the question that  
17 I haven't given you a chance to answer yet is: What the heck  
18 was he doing calling Petal Card in April?

19 MS. KUNSTLER: So your Honor, let me take a moment to  
20 address that point. On that point, first, we are of the view  
21 that the contact with Petal was actually not a prohibited  
22 contact. So that's where we start from. This was, as we  
23 understand it, a contact via a portal, a public portal.  
24 Sometimes those are answered by bots. It was some kind of a  
25 communication with customer support. It was a very low-level

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1 contact, very limited interaction that could, your Honor, fall  
2 well within a normal investigation activity by a lawyer.  
3 That's our view. We don't think that it actually rises to the  
4 level of a prohibited contact. And the defendants provide the  
5 language from the rule which is communicating about the subject  
6 of the representation with a party the lawyer knows to be  
7 represented. This is such a low-level contact, we don't think  
8 it rises to the level of communicating with someone who's  
9 actually in the company who knows about the litigation, about  
10 the litigation. But --

11 THE COURT: What did he actually do?

12 MS. KUNSTLER: It's not entirely clear to me, your  
13 Honor. I believe that he had a chat, possibly through a bot,  
14 with the portal that Petal had established.

15 THE COURT: If he had gone to a better law school, he  
16 probably wouldn't have done that.

17 MS. KUNSTLER: Your Honor, the point that I think I'm  
18 winding up to really express is that even if that were true --  
19 and I think this is our real bottom line -- we don't think it  
20 was prohibited, but even if it were true, it does not mean he  
21 is not a lawyer, it does not mean that he does not have a  
22 privileged relationship with his wife, that he does not have an  
23 attorney-client relationship with his wife. He is of course  
24 not -- and I'll repeat the phrase -- litigation counsel of  
25 record in this case, and it does not have any effect on the

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1 privilege to which he and the plaintiff are entitled in their  
2 relationship. Even if it is a disciplinary or professional  
3 responsibility problem, it does not mean he is not a lawyer and  
4 it does not mean that they aren't capable of having privileged  
5 communications.

6 THE COURT: Okay. So I'm going to just reiterate that  
7 back to you. You don't think that he violated the rules of  
8 professional conduct, and if he did, that doesn't make him not  
9 a lawyer; that makes him a lawyer in trouble with the grievance  
10 committee.

11 MS. KUNSTLER: Correct. I think that's a fair --

12 THE COURT: All right. Let me back you up. And I  
13 will give Ms. Barnaby a chance to make her broader argument in  
14 a moment, but let me just back you up. Maybe this is the tail  
15 wagging the dog, but there are nine documents on the privilege  
16 log which are alleged to be work product that are dated before  
17 Ms. Shih was married to Mr. Kauder, before he was a member of  
18 the bar, and two years -- actually more than two years --  
19 before this litigation was commenced. What is your admissible  
20 evidence that these documents (a) were created in anticipation  
21 of litigation by Ms. Shih -- I take your point that you don't  
22 have to have a lawyer involved when there's a federal work  
23 product question, but what is your admissible evidence that the  
24 documents were created by a party in anticipation of litigation  
25 and that that privilege was not waived by sharing the documents

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1 with Mr. Kauder, some guy she was dating at the time, not a  
2 relationship which had any legal guarantees of confidentiality  
3 and trust?

4 MS. KUNSTLER: Your Honor, let me direct you -- first  
5 of all, let me answer that, if I -- again, I want to make sure  
6 I'm answering the right question. There is admissible evidence  
7 in the record, and I can give you the Bates number, and I'm  
8 happy to provide it to your Honor.

9 THE COURT: So it's not in the record. You're saying  
10 it's in discovery.

11 MS. KUNSTLER: I'm sorry. It's in the case. It's  
12 been produced to the defendants, all right? Starting -- and  
13 I'll give you a Bates number. This is a redacted document.  
14 S-H-I-H, SHIH, 0000 -- I think that's four zeroes -- 3669.  
15 This is a -- I guess it's a chat between Ms. Shih and  
16 Mr. Kauder, and they have been discussing the issue that she's  
17 facing with regard to the discovery that CreditBridge had been  
18 established and her claim and what she should do about it, and  
19 you can see in this document the build-up to actually  
20 formulating a potential litigation strategy. This is a  
21 confidential communication under the work product doctrine.

22 THE COURT: I'm sorry. What makes it confidential?  
23 That they were dating, that makes it confidential? They could  
24 put it on Facebook. That's done all the time.

25 MS. KUNSTLER: He could have but he didn't, and that

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1 actually distinguishes one of the cases that they rely on. He  
2 could have but he didn't. There was no risk here that this  
3 would be shared with opposing counsel or get into the hands of  
4 a hostile party. Now --

5 THE COURT: Look, Ms. Kunstler, the cases you're  
6 referring to about when work product is and isn't raised by  
7 sharing the document with a third party, I'm familiar with  
8 those cases. They do contain the language you're alluding to,  
9 but they don't involve boyfriends and girlfriends. They  
10 involve accountants; they involve business partners; they  
11 involve folks who were in a joint venture with you; they  
12 involve folks who are in some kind of -- not a social  
13 relationship with you but a legal relationship with you, which  
14 gives some assurance that they really are on your side with  
15 regard to the legal matter. Do you have a boyfriend-girlfriend  
16 case?

17 MS. KUNSTLER: I think, your Honor, with all due  
18 respect, they were married a year later. They considered  
19 themselves --

20 THE COURT: I hadn't even met my husband a year before  
21 I married him. Maybe that's too much information, but --

22 MS. KUNSTLER: In their view, they had a confidential  
23 relationship. These were confidential communications that  
24 would never be shared outside of the two of them. He is a law  
25 student. She is turning to him for legal advice. They are

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1     formulating a litigation strategy. The first entry on the log  
2     is his legal research that he is providing to her in  
3     confidence. That's the very first entry on the log. And that  
4     is dated -- I'll give you the exact date because I have it  
5     here -- February 8, 2016, which is the time of this text  
6     exchange, where you can see they are building up to a  
7     litigation strategy. Unlike Wolf, where they were the  
8     defendant and there was an incoming demand letter, she's the  
9     plaintiff, so there's not going to be an incoming demand  
10    letter. She's generating the claim. She's relying on her  
11    trusted partner to assist her. He's a consultant. The rule  
12    does not exclude boyfriends or fiancés from being consultants.  
13    She is the party. She is generating the documents that she's  
14    sharing in a confidential relationship with her husband -- with  
15    her --

16           THE COURT: Boyfriend.

17           MS. KUNSTLER: -- trusted partner.

18           THE COURT: Were they living together at the time,  
19    counselor? Forgive me for asking for too much information.

20           MS. KUNSTLER: That I do not know the answer to.

21           THE COURT: All right. Did they have any children  
22    together at the time?

23           MS. KUNSTLER: I know that she was in New Zealand and  
24    that they were busy planning their future.

25           THE COURT: Busy planning their future. Okay.



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1 MS. KUNSTLER: They were -- they were busy planning  
2 their future.

3 THE COURT: You keep saying, "You can see." Of course  
4 I can't see, not having seen any portion of this document.

5 All right. I think we've spent as much time as is  
6 going to be productive on the nine documents that predate both  
7 the marriage and the admission to the bar.

8 With respect to the post-marriage period, let me just  
9 summarize for you what I think your view is. At the moment he  
10 married her, she and he were both entitled to claim the spousal  
11 privilege, which was not waived by the addition of a third  
12 party on their communications if the third party was a lawyer.  
13 And vice versa; the attorney-client was not waived by the  
14 addition of a spouse into the communications. That I think is  
15 your theory for the period of time between the marriage and the  
16 admission to the bar.

17 After the admission to the bar, your theory is, I  
18 think, that Mr. Kauder himself should be credited, for  
19 privilege purposes, as being one of Ms. Shih's attorneys and  
20 that I should take your word for it with respect to all of  
21 these communications that he had his attorney hat on and not  
22 his husband hat on. And that takes us pretty much through the  
23 present day, since he remains both an attorney and her husband  
24 and that nothing changed substantively with the consultative  
25 agreement being signed in June of 2019.

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1 MS. KUNSTLER: Your Honor, I want to -- I believe that  
2 your last statement I believe captures our position. I want to  
3 circle back, if I could, to make sure I understood, because we  
4 haven't really discussed the time period between the marriage  
5 and his admission to the bar. I'm not sure I understood your  
6 summary. During that time -- go ahead, if you'd like to  
7 restate it.

8 THE COURT: No. It's your position that I'm trying to  
9 get right, so why don't you tell me.

10 MS. KUNSTLER: All right. During that period,  
11 Mr. Kauder and Ms. Shih were married, so they had a spousal  
12 relationship. The spousal privilege went throughout that  
13 period and, in fact, goes through to today. For communications  
14 that included a third party --

15 THE COURT: Like a lawyer.

16 MS. KUNSTLER: -- like a lawyer, we have not claimed  
17 spousal. I wanted to make sure that clarified. We have  
18 made -- we have flyspecked our log -- and I can't begin to tell  
19 you the burden, but I won't go into that -- to remove  
20 references to spousal privilege where there's a third party.  
21 There are not very many of those. They are chiefly when she  
22 was looking for an attorney as soon as -- right after they got  
23 married, that she started looking for an attorney and looked  
24 for an attorney at Buckley Sanders and she was referred to  
25 another lawyer and then came to her litigation counsel. We

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1 have not claimed spousal privilege for communications between  
2 Ms. Shih and her husband that included a third party.

3 THE COURT: What you have claimed, I think, with  
4 regard to that category, is the attorney-client privilege.

5 MS. KUNSTLER: Correct. And if we have claimed  
6 attorney-client, we have identified the attorney, and we've  
7 bent over backwards -- because this was a request the  
8 defendants made -- to identify the attorney. For example, if  
9 Ms. Shih forwarded a communication from her litigation counsel  
10 to her spouse, that does not destroy the privilege. That's  
11 clear in the law. That's never been challenged. You can  
12 forward things from your lawyer to your spouse without  
13 destroying the privilege.

14 THE COURT: Unless you're in a divorce case. That  
15 would be a problem.

16 MS. KUNSTLER: Fortunately that's not our situation.

17 THE COURT: Right.

18 All right. So with regards to this period of time, if  
19 it's a three-way communication or a forwarded communication  
20 involving an attorney other than Mr. Kauder, your theory is  
21 that those communications are privileged under the  
22 attorney-client privilege, and this is before he's a member of  
23 the bar, but he's her husband, and therefore sharing those  
24 communications with the husband doesn't destroy the privilege.

25 MS. KUNSTLER: That is correct. And we've bent over

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1 backwards to try to identify the lawyer if in fact that spousal  
2 communication also contained an attorney-client element because  
3 it's derived from Ms. Shih's communications with an actual  
4 lawyer.

5 THE COURT: Right. And then once he's a member of the  
6 bar, your view is, to use your metaphor, you have both a belt  
7 and suspenders. The belt is the attorney-client privilege, and  
8 the suspenders are the spousal privilege, or perhaps vice  
9 versa, that the two reinforce each other, that the presence of  
10 the spouse does not destroy the attorney-client privilege, nor  
11 does the presence of the attorney destroy the spousal  
12 privilege, and therefore, everything is copacetic.

13 MS. KUNSTLER: Not exactly. I apologize, again, your  
14 Honor, for trying -- believe me, we've been trying to refine  
15 this for exactly this reason, to avoid any confusion.

16 Even after he became a member of the bar, if he is  
17 interacting in a three-way communication with, for example,  
18 litigation counsel, we do not claim spousal privilege over that  
19 three-way communication.

20 THE COURT: You claim only the attorney-client  
21 privilege.

22 MS. KUNSTLER: Correct. Because she has an  
23 independent attorney-client relationship with her husband and  
24 she has an independent attorney-client relationship with her  
25 litigation counsel, and then there is a consulting agreement,

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1 and that communication is within the attorney-client privilege,  
2 but we do not claim spousal for those three-way communications.

3 THE COURT: What about for two-way communications  
4 between husband and wife during this period of time; do you  
5 claim both?

6 MS. KUNSTLER: Yes. Two-way communications, only  
7 between the two of them, where she's forwarding something to  
8 him or she's sending a message that incorporates legal advice,  
9 that is spousal, because it's just the two of them, it's  
10 confidential, and meets the parameters of a spousal privilege.  
11 So in those cases --

12 THE COURT: But do you also claim attorney-client for  
13 those because she has --

14 MS. KUNSTLER: Correct. No. Well, okay. Sorry. The  
15 demarcation would be January of 2019. Before January 2019, if  
16 it incorporates advice from another lawyer, it can be  
17 privileged as well as spousal, and we've identified the lawyer.  
18 After January 2019, if it's a two-way communication, yes,  
19 spousal, attorney-client, work product would all apply to those  
20 two-way private communications just between the two of them. I  
21 know it's confusing, and I appreciate your Honor's bearing with  
22 us as we walk through this.

23 THE COURT: All right. I appreciate that.

24 Now what about the documents that aren't on the log at  
25 all? It appears -- I think you're both talking about the same

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1 thing. My original direction, repeated a couple of times, was:  
2 The parties need not log communications with their litigation  
3 counsel of record after a certain date. I don't remember what  
4 date I gave you. I believe, Ms. Kunstler, that you took the  
5 position or interpreted that to mean -- something that came as  
6 a surprise to your opponent -- that you didn't have to log  
7 those communications even if someone other than counsel of  
8 record were on them, i.e., Mr. Kauder. Are you now logging  
9 those documents?

10 MS. KUNSTLER: Yes, your Honor, we have logged those  
11 documents. Again, when we read your Honor's original  
12 instruction, we believed that the fact that Mr. Kauder was an  
13 attorney and thus within the privilege, even as to  
14 communications with litigation counsel, meant that they did not  
15 have to be logged, but we understand that your Honor's -- and  
16 I -- as is plain in our letter, I answered your Honor's  
17 question thinking I was answering your Honor's question. But  
18 in any event, the bottom line is, we have logged those  
19 documents, and we have provided that log to the defendants.

20 THE COURT: I haven't seen it yet, right?

21 MS. KUNSTLER: You have not seen it yet. There is now  
22 a log of those documents, and it starts in -- I believe the  
23 first entry is July of 2019. Actually, the first entry is  
24 June. It's starts with the consulting agreement, your Honor.

25 THE COURT: And the consulting agreement itself has

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1     been produced?

2             MS. KUNSTLER:   Yes, it has.

3             THE COURT:   Okay.   You've waited a long time,  
4     Ms. Barnaby, to speak in favor of your own motion.   I'm sorry  
5     to have kept you waiting.

6             MS. BARNABY:   Well, I think that this entire process  
7     really illustrates why we're here today, which is that we are  
8     wrestling with the fundamental question of what is Mr. Kauder's  
9     role, and through an iterative process we have more clarity  
10    now, but that does not resolve the question.   And I know  
11    Ms. Kunstler raised the point that fundamentally this is aimed  
12    at litigation, core litigation communications, but I want to be  
13    clear that that's not what this is about.   This is about  
14    fundamentally understanding what Mr. Kauder's role is here,  
15    particularly in light of the fact that he's been identified in  
16    initial disclosures as a key fact witness for plaintiff on the  
17    core issues.

18            THE COURT:   Let me stop you there and explore that a  
19    little bit with you, because you've mentioned that possibly a  
20    few times in your letter briefs.   I'm not sure what you think  
21    flows from that.   Are you taking the position that because  
22    someone is potentially a key fact witness that they're not  
23    entitled to claim attorney-client privilege if they were  
24    otherwise entitled to do so, or are you taking the position  
25    that you're going to have to invoke the attorney witness rule,

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1 which doesn't really fit here because the attorney witness rule  
2 would arguably prohibit Mr. Kauder from standing up in court on  
3 behalf of Ms. Shih, but I don't think applies in a situation  
4 where someone is behind the scenes her counselor? So what does  
5 flow? Are you taking the position that he's going to have to  
6 turn over a bunch of privileged documents when he has his  
7 deposition taken because they refreshed his recollection? I'm  
8 trying to tease this out here.

9 MS. BARNABY: Sure. I think it creates all nature of  
10 complexities, but also, here, it was figuring out -- it took us  
11 a long time to figure out that these four periods are the  
12 periods that the plaintiff is asserting. And in particular,  
13 there are a number of communications, communications that were  
14 produced from early on, discussions between Ms. Shih and  
15 Mr. Kauder, that go to the question of when is he shielding  
16 communications with the assertion of privilege and when is he  
17 producing information in his fact witness hat, so to speak,  
18 that they find beneficial to their case? So this is, we  
19 believe, a question that will come up in testimony, will come  
20 up on the -- from the perspective of subject matter waiver,  
21 come up from the perspective of how does he fit in and what  
22 role is he taking here.

23 But I want to also back up and address these four  
24 different periods, and I'm going to take it from the closest  
25 period in time and start peeling back the layers.



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1           So we start, as your Honor has identified, in the  
2           period where he's married, a lawyer, and has signed on to this  
3           consulting agreement.

4           THE COURT:   So post June 24th of 2019.

5           MS. BARNABY:   2019.   And what we take from there and  
6           peel back one layer, so we've removed the consulting agreement  
7           to this period of time between 2017 and June 2019, where we're  
8           being told, without any evidence to support this claim, that he  
9           is serving as her attorney in this period, and I want to note a  
10          couple of things on that front.   One, we have Mr. Kauder in  
11          fact produced his communication with Petal during that time  
12          period.   It is a five- or six-email exchange with someone in  
13          customer service, actually asking specifically about issues  
14          that have been raised and questioned in discovery about whether  
15          there's a requirement of six months of US bank records.   So not  
16          to get you bogged down in the facts, your Honor, here for the  
17          merits, but the point is, in April of 2019, Mr. Kauder is  
18          contacting a known represented party and asking questions about  
19          issues that are being explored now in discovery.   And --

20          THE COURT:   Well, but is the answer to that that it  
21          means he's not a lawyer or is the answer to that, as I  
22          suggested with Ms. Kunstler, he could very well be a lawyer but  
23          if so, he's a lawyer in potential trouble?

24          MS. BARNABY:   It could mean that he's a lawyer in  
25          potential trouble, but I think, your Honor, that it is

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1 competent evidence demonstrating that he was not viewing  
2 himself as an attorney for Ms. Shih at that point in time,  
3 because I'm not going to ascribe to him a negative assumption  
4 that he was purposely flouting his ethical obligations. Now so  
5 to us, that is demonstrative of the fact that he was not  
6 viewing himself as an attorney. And I want to also note that  
7 in fact that's consistent with what Ms. Kunstler presented in  
8 her responses to your questions, because I wrote down -- she  
9 noted that the plaintiff has been relying heavily, even before  
10 Mr. Kauder was admitted, on his advice, and she said that that  
11 shows that the plaintiff is relying on Mr. Kauder as an  
12 attorney relationship. I think it's the opposite. If she's  
13 been relying on him for his advice since he was a law school  
14 student and her boyfriend, we have nothing that he demonstrates  
15 that the nature of the relationship changed just because he  
16 passed the bar. And instead we have demonstrative evidence  
17 showing that he's not acting as a lawyer, instead contacting a  
18 represented party on issues that are the subject of discovery.

19 THE COURT: Well, Ms. Kunstler says that if the same  
20 individual is both a party's spouse, which is undisputed here,  
21 and a lawyer admitted to practice, which is undisputed here,  
22 after January of 2019, that the law will in effect presume that  
23 the lawyer/spouse was acting as legal counsel for the  
24 non-lawyer spouse. What say you to that?

25 MS. BARNABY: I have not seen the plaintiff put

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1 forward any of that case law, and in fact the *Sosnow* case says  
2 the opposite, at least on the agency front, that one does not  
3 presume that a spouse is an agent simply because of the  
4 marriage, and that was in the context of a privilege question  
5 and how the -- whether the presence of a spouse disrupted the  
6 attorney-client privilege. So I think that goes too far. And  
7 the core issue here is also that it's plaintiff's burden to  
8 demonstrate these points, and as your Honor has noted during  
9 the conversation today, there is a lack of any evidence to  
10 support that burden. There's no declaration from either --

11 THE COURT: That's why I'm asking if there's a  
12 presumption, because the presumption could possibly take the  
13 place of admissible evidence on this.

14 MS. BARNABY: We don't believe that there is such a  
15 presumption, and from everything I've heard today and seen in  
16 the documents, it appears that the nature of the relationship,  
17 from the time that Mr. Kauder was a law school student and her  
18 boyfriend, to the present, hasn't changed, at least until he  
19 signed an agreement with Mr. Dawson. So he --

20 THE COURT: All right. But however, after he marries  
21 her, he is a spouse.

22 MS. BARNABY: Correct.

23 THE COURT: So they're entitled, at least for certain  
24 communications, to rely on the spousal privilege, are they not?

25 MS. BARNABY: They are entitled to, but not when the

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1 spouse is participating as a third party in communication with  
2 counsel. So -- and they have not demonstrated -- they note in  
3 their papers an exception for agency, but they must prove that  
4 he is serving as her agent, and they've put forward no evidence  
5 of that, and that was not the claim that was presented. So  
6 when he is a spouse participating in communication, which makes  
7 them three-way communications, we think it destroys both the  
8 spousal privilege and the attorney-client privilege.

9 Now we can peel back to before he's married and before  
10 he's a lawyer, and I think this is the most fundamental period  
11 of time, where it's clear that there is no basis for asserting  
12 a privilege or protection of any of these documents.

13 THE COURT: These are the nine early documents.

14 MS. BARNABY: These are the nine. And to the extent  
15 that they are also redacted documents from this period -- and  
16 we have some confusion about the status of redactions. There  
17 was a new log provided to us last night, and we've not had an  
18 opportunity to review that for purposes of today's hearing.  
19 But at that period in time, he was her boyfriend only. There  
20 is no, recognized in the law, boyfriend-girlfriend privilege.  
21 That is not the kind of confidentiality that is recognized in  
22 the law. To the extent that a party can create papers that may  
23 be covered by work product -- and I note that the *Kamal* case  
24 identifies that there's a split of authority as to whether an  
25 attorney needs to be involved. I don't think that's a settled

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1 question. And we believe that the weight of the authority  
2 supports involvement or preparation to provide to an identified  
3 counsel. But here, that's not what's happening. She's working  
4 with an independent third party, a friend of hers. Yes, they  
5 have a close relationship. It's not a legally recognized  
6 protected relationship, and her providing information to him  
7 does not get work product coverage. I know Ms. Kunstler speaks  
8 about -- and you questioned in fact whether providing  
9 information to an accountant is akin to providing information  
10 to a boyfriend. Not only, as you recognized, are those  
11 relationships different, but I think that from my review of the  
12 cases, my understanding is in those situations, where  
13 information, work product was being asserted over information  
14 shared with a friendly party, you back up to the facts and you  
15 see it's in the context of working with an attorney for  
16 purposes of litigation. So here, this is years before  
17 litigation is filed, years before litigation counsel of record  
18 is engaged, and we've just got two friends talking about what  
19 plaintiff's interest is in this business, that she claims she  
20 came up with. So I think if we build back up, we see no basis  
21 for any assertion of work product privilege over those nine  
22 documents, and without those, without that assertion, those  
23 must be produced. When they're married and he's not a lawyer,  
24 to the extent that he is on three-way communications, the  
25 attorney-client privilege is broken by his participation and

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1 those documents should be produced. And then while he's  
2 married and a lawyer, we don't have any evidence that he was in  
3 fact acting as her attorney in that period and so we don't  
4 believe that the privilege would extend to him and his  
5 participation as well.

6 THE COURT: Ms. Kunstler.

7 MS. KUNSTLER: Yes, your Honor. Let me start with the  
8 nine documents before they were married. The documents that I  
9 referenced earlier that have been introduced in this case talk  
10 about hiring lawyers, looking for lawyers. She was in New  
11 Zealand at the time. She was communicating with her boyfriend,  
12 or fiancé, who was a law student, who was vigorously conducting  
13 legal research for the purpose, and there's no doubt that this  
14 was done in anticipation of litigation; otherwise, this would  
15 not have been done. So that factor is passed. This material  
16 was compiled; the research was conducted for the purpose of  
17 litigation, and these documents that are already produced show  
18 that they are talking about hiring a lawyer. When they got  
19 married -- and it wasn't that long a time period; that's  
20 exaggeration -- one of the first things they did when she got  
21 to the United States was start looking for a lawyer. And she  
22 started with Buckley Sanders, where her then summer associate  
23 husband was working. Those communications are privileged work  
24 product. As a summer associate, he's part of the privilege  
25 that would attend to communications with Buckley Sanders

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1 attorneys. There are 11 of those documents. Those are all  
2 work product and privileged, because she was actively looking  
3 for a lawyer. Those referrals led her to Mr. Dawson, who is  
4 her litigation counsel, and there are virtually no other  
5 three-way communications between her return to the United  
6 States and their marriage in May of 2017 and the 2019 three-way  
7 communication with Mr. Dawson. There are none. If I can go  
8 back and confirm that on the log for your Honor.

9 It's a non-issue. There are none. There are  
10 communications with Buckley Sanders, including him as a summer  
11 associate. They were referring her to another lawyer. Her  
12 communications with that lawyer were separate, without her  
13 spouse. Her early communications with Mr. Dawson did not  
14 include her spouse. There are no three-way communications that  
15 include her husband as spouse until January of 2019. So it's a  
16 non-issue.

17 Finally, the record is replete with her reliance on  
18 her husband -- her husband's status, his advice. There is law  
19 that we have cited, even though it sounds like opposing counsel  
20 may not have focused on it, that demonstrates that an implied  
21 attorney-client relationship exists, including if there are  
22 gratuitous legal services being provided without pay for  
23 someone that you have a relationship with. So we think that  
24 the issues that they are raising are really nonissues, they're  
25 all bolstered by the record, and that all of our claims -- our

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1 work product and spousal and attorney-client -- are all  
2 justified, and we've bent over backwards to document them in  
3 the log.

4 THE COURT: All right. Thank you both very much. I'm  
5 in a position to give you a ruling as to some but not all of  
6 the time period at issue.

7 With respect to the nine documents -- that is to say,  
8 with respect to documents withheld prior to either the marriage  
9 or the admission to the bar -- those documents are going to  
10 have to be produced. I have some question as to whether the  
11 plaintiff has established that these documents were prepared in  
12 anticipation of litigation, which is always the first question  
13 with respect to work product. The lack of lawyers involved --  
14 that is, an actual lawyer admitted to the bar -- is not fatal,  
15 as I understand the federal rule, but I have some question as  
16 to whether the plaintiff has adequately established that these  
17 documents were created in anticipation of litigation. I have  
18 counsel's assertion that this is the case, I am told that the  
19 content of the documents would corroborate this, but I don't  
20 have any evidence. I don't have anybody's declaration, for  
21 example. That would have been a relatively simple matter. But  
22 I don't rest my decision with respect to those nine documents  
23 on this point, because even if I assume for purposes of ruling  
24 on the motion that Ms. Shih's work product during this period  
25 of time was in anticipation of litigation, I cannot find, in



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1 the absence of a speck of admissible evidence, that the work  
2 product protection was preserved when she forwarded those same  
3 documents to Mr. Kauder, who at that point was, as far as I can  
4 tell from the record, a boyfriend living on a different  
5 continent. They were not married; they did not have any  
6 legally protected relationship. They would not be married for  
7 15 months. I certainly cannot, as a United States magistrate  
8 judge, make an assumption that a man and a woman who get  
9 married 16 months later are in a relationship of trust and  
10 confidence with sufficient guarantees, 15 months prior, to  
11 warrant the protection of the work product doctrine, which,  
12 like all privileges, is an impediment to the search for truth  
13 and therefore must be narrowly construed. So I am certainly  
14 not going to read a boyfriend-girlfriend codicil into the  
15 federal law of work product, and no actual evidentiary showing  
16 having been made here that the relationship was the sort of  
17 relationship which permits sharing of work product without  
18 waiving it, I cannot find that that happened here. So those  
19 documents will have to be produced.

20           Once Ms. Shih and Mr. Kauder are married, the spousal  
21 privilege applies. I am uncertain as to whether the  
22 attorney-client privilege also replies, which is going to be  
23 necessary for some but not all of the withholdings before me.  
24 Here, I have the same problem that I had with the motion going  
25 in the other direction, which is we have someone who was

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1 wearing two hats; we have an assertion made by counsel that he  
2 was wearing his attorney hat, at least with respect to the  
3 withheld communications. We don't have any admissible evidence  
4 of that fact, unless we have a presumption that's going to do  
5 the work of admissible evidence. Since I agreed to look at the  
6 corresponding documents involving Mr. Gross *in camera*, I'm  
7 going to do the same here with respect to the period of time  
8 after the marriage and after Mr. Kauder was admitted to the bar  
9 but before the consulting agreement was signed. So I will  
10 permit the challenging party -- in this case, Ms. Barnaby, your  
11 client -- to designate six documents from that period of time  
12 that you want me to look at *in camera*, and I will permit  
13 Ms. Shih to designate three additional documents that show the  
14 nature of the relationship and the attorney-client hat being on  
15 at the same time frame. Please let each other know what your  
16 designations are by Friday, and plaintiff's counsel will send  
17 the documents to me by email by Monday, with a cover letter on  
18 ECF merely identifying which documents have been produced, and  
19 I will take a look at those before I make any decisions with  
20 respect to the period of time after the marriage and prior to  
21 the consulting agreement.

22 With respect to the period of time after the  
23 consulting agreement, I would like to see that consulting  
24 agreement, please. I would like that if it's not privileged  
25 and not confidential. Is there any reason that can't be

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1 attached, Ms. Kunstler, to your letter and placed on the public  
2 docket?

3 MS. KUNSTLER: I don't believe so, your Honor.

4 THE COURT: Sorry. I didn't hear you.

5 MS. KUNSTLER: I believe we can provide that to your  
6 Honor. The other side has the document.

7 THE COURT: Okay. That's fine. So provide that to me  
8 at the same time that you're providing me *in camera* documents,  
9 and I will take that portion of the motion under submission. I  
10 will probably not give you a ruling on that portion of the  
11 motion until I've also gone through the *in camera* documents  
12 with respect to the middle time period. And I'll try and turn  
13 that around as quickly as I can, but the first thing I need is  
14 some additional documents from the parties. But I did not get  
15 to, during our argument today -- and I'm not sure whether we  
16 need to or not -- I know, Ms. Barnaby, you have some remaining  
17 concerns about the amount of detail provided on the privilege  
18 log. Did you want to give me 30 seconds on that? Because I  
19 didn't really ask you about that earlier.

20 MS. BARNABY: Sure. Yes, your Honor. The concern is  
21 really with the ability to identify the contents of the subject  
22 matter of documents, and particularly you could see in your  
23 example that documents that are attachments have no subject  
24 matter information provided, there's no email subject, and no  
25 title of the document. And then we do have concern --

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1 THE COURT: The attachments in particular, that's your  
2 concern?

3 MS. BARNABY: I think the attachments are exemplary of  
4 an overarching issue with missing sufficient detail on the  
5 subject matter on the log.

6 THE COURT: Well, there do seem to be a lot of blank  
7 subject matter items in the subject matter column.  
8 Ms. Kunstler, do you want to explain to me why that's not a  
9 problem.

10 MS. KUNSTLER: I want to make sure I'm looking at the  
11 right document.

12 THE COURT: Sure.

13 MS. KUNSTLER: This is Exhibit A to --

14 THE COURT: It's Exhibit A to Docket No. 176, a  
15 July 28th letter from Alston & Bird.

16 MS. KUNSTLER: All right. Yes, okay.

17 First of all, let me make a couple of comments. We  
18 have revised this log again, and if your Honor would bear me a  
19 slight diversion, the original instruction from your Honor was  
20 that the parties were to meet and confer before the  
21 supplemental log was submitted. And the defendants chose --  
22 there was a change of counsel right after the last conference.  
23 We fully expected to engage in a meet-and-confer with opposing  
24 counsel right after the last conference. There was a change in  
25 counsel. We understand that. New counsel chose not to meet

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1 and confer before July 21st. Instead, they chose to meet after  
2 they got the log, which, by the way, which ultimately occurred  
3 on July 26, two days before the letters were due. So it's been  
4 a little bit of a whack-a-mole, "gotcha" game that we have  
5 found ourselves in, frankly.

6 Now a lot of these entries have been revised. We have  
7 endeavored to address the issues that we see coming up in their  
8 letters. We did not have, frankly, a meet-and-confer in which  
9 we tried to resolve issues regarding the log. The  
10 meet-and-confer was really just asking us questions about X, Y,  
11 or Z positions but not trying to actually resolve anything.  
12 Some of the entries are actually misquoted in their letter. We  
13 do have the nature of the legal advice. We have provided the  
14 subject lines of the emails where they're available. We have  
15 identified the authors of documents. We have identified the  
16 sources of the legal advice if there's an attorney involved.  
17 We've bent over backwards to do that. Identifying the names of  
18 the documents is not required under the rule and would get us  
19 into, I can assure your Honor -- I imagine your Honor can  
20 understand, we are logging five years of work product related  
21 to this litigation. These are not transactional documents that  
22 are actually related in any way to the events of the case in  
23 2015 and 2016. These are litigation documents from 2018, 2019,  
24 2020, 2021. Those documents' names reveal privileged  
25 information. We've done our very best to provide the nature,

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1 without disclosing a privilege, of the communication,  
2 discovery, non-party discovery, draft briefs, etc.

3 THE COURT: Well, I'll tell you what.

4 MS. BARNABY: This is ignoring the first two years of  
5 the log and the --

6 THE COURT: Ladies.

7 MS. BARNABY: We don't need to get bogged down in  
8 history.

9 THE COURT: Ms. Barnaby, Ms. Barnaby, I didn't call on  
10 you. I didn't call on you, Ms. Barnaby. Just hold your fire,  
11 please.

12 I think having heard what I've heard so far and having  
13 heard that there is a revised log that I haven't seen yet --  
14 correct?

15 MS. KUNSTLER: That's correct, your Honor.

16 THE COURT: Why don't you submit that on Monday.

17 MS. KUNSTLER: Would you like to see the whole log?

18 THE COURT: No, I don't think so. But the portions  
19 that appear as Exhibit A to Docket 176, which are the Kauder  
20 portions, if I could see the corresponding portions as revised,  
21 that would be helpful.

22 MS. KUNSTLER: Okay. And your Honor, I should  
23 probably point out, in case it's not evident, that blanks --  
24 some of these items that are blank are documents that were  
25 produced. So the attachments were all produced; the privileged

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1 email was withheld. The blanks are documents they have. So  
2 rather than try to describe them or claim a privilege that  
3 obviously they wouldn't apply since they have the documents,  
4 those are blank.

5 THE COURT: Well --

6 MS. KUNSTLER: That's the explanation for the blanks,  
7 in case it wasn't clear.

8 THE COURT: Hold on. Hold on. Let me make sure I'm  
9 understanding that, because I surely did not up until now.

10 So looking at Exhibit A again, technically Docket  
11 176-1, which is the portion of the privilege log in its then  
12 current form that was submitted to me on July the 28th, I see  
13 on the first page, a little more than halfway down the page,  
14 there is an item which is PRIV 13, a bunch of intervening rows  
15 and then 13, but a couple of columns over, that same document  
16 is also identified with a Bates number, indicating a production  
17 number. What's happening there? Was that document produced,  
18 withheld, redacted or what?

19 MS. KUNSTLER: Okay. I will explain to you -- and I  
20 had to learn a little bit about the technology myself. So for  
21 that entry, PRIV 13 --

22 THE COURT: Yes.

23 MS. KUNSTLER: -- there is a -- two columns over, as  
24 you note, there is a production number of 6115, if I'm reading  
25 it correctly.

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1 THE COURT: Correct.

2 MS. KUNSTLER: That document was included as a slip  
3 sheet in the production. So it was slip sheeted saying  
4 "Privileged Document Withheld," and we have logged it and we've  
5 described the document. It is work product, and the  
6 description has I'm sure changed. It says now, earlier,  
7 "Communication between spouses regarding seeking legal advice,"  
8 and this is in June of 2017, "and retaining counsel," and I'm  
9 sure Mr. Kauder is at Buckley and in fact it is to his Buckley  
10 Sanders email where he, as a summer associate, is considering  
11 bringing this case -- or they're talking about bringing this  
12 case to the attention of Buckley Sanders for potential  
13 litigation counsel.

14 THE COURT: So this particular document, PRIV 13, was  
15 withheld.

16 MS. KUNSTLER: Correct. And a slip sheet was included  
17 and the slip sheet got a Bates number.

18 THE COURT: All right. Now go down a couple of items  
19 to PRIV 18, 19, etc. I see a whole slew of them there which  
20 are identified as email attachments are given production  
21 numbers and then are not further described in the right-hand  
22 column.

23 MS. KUNSTLER: Those documents were all produced.

24 And --

25 THE COURT: They were produced.



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1 MS. KUNSTLER: The covering email, being privileged,  
2 was withheld, but the documents were produced.

3 THE COURT: So looking at your log, if the document  
4 has a production Bates number, how can we tell, other than  
5 going to the production itself, which of course I can't do, and  
6 looking to see if it's an actual production number or a  
7 slip-sheeted page, whether that document was produced or not?

8 MS. KUNSTLER: So I worked with the vendor on that  
9 exact problem, and the way you can tell is that if it has a  
10 production number with a privilege description, that is a  
11 document that was produced as a slip sheet, not in whole. If  
12 it has a Bates number and there's no privilege designation or  
13 description, they let the document speak for itself; that is a  
14 document that was produced.

15 THE COURT: So PRIV 18 through PRIV 21 were produced.

16 MS. KUNSTLER: That's correct. The covering email was  
17 withheld as privileged but the attachments were produced. So  
18 the evidence was produced.

19 THE COURT: PRIV 22 was withheld.

20 MS. KUNSTLER: Yes, because that is, unlike the other  
21 attachments, work product. It is a memorandum and analysis  
22 prepared by the client, and she's identified. The author is  
23 there, Cassie Shih, memorandum and analysis of the issues  
24 prepared by a party in anticipation of litigation in connection  
25 with seeking legal advice from Buckley about representing her

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1 in this very case.

2 THE COURT: All right. Last question and then we're  
3 going to have to wrap this up, because I have another  
4 obligation. PRIV 1 through PRIV 9, which were withheld, why  
5 don't they have a production number, even if it was only slip  
6 sheeted?

7 MS. KUNSTLER: Not every document that is privileged  
8 ended up with a slip sheet. So this goes to how the production  
9 was assembled, and if a document was withheld and not part of  
10 the -- and actually, Mr. Dawson handled this so I would defer  
11 to him if I'm saying something incorrect here. These are  
12 documents that were withheld that did not need slip sheets  
13 because they weren't included in the actual production. And  
14 you can see the first item is in fact a legal memorandum  
15 prepared by Mr. Kauder. I know your Honor has ruled. If  
16 there's an opportunity to provide additional evidence in any  
17 sort --

18 THE COURT: No. That ship has sailed.

19 MS. KUNSTLER: All right. I understand your Honor's  
20 ruling.

21 THE COURT: Okay. So I'll take a look at the same  
22 portions of the log in their revised form. You'll submit that  
23 to me with all the other materials we just discussed on Monday.  
24 But you will produce those first nine documents.

25 MS. BARNABY: For what's produced on Monday, in terms

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1 of the additional log, I just wanted to note that there are  
2 items also attached to our reply briefing, so if the updated  
3 log could include all of the selections, which are  
4 representative samples of the issue.

5 THE COURT: You're talking about Exhibits -- what is  
6 it now E and F?

7 MS. BARNABY: Yes. So -- and 181-1.

8 THE COURT: I think we can leave it there. So that I  
9 see the current version of everything that Ms. Barnaby was  
10 complaining about in this motion.

11 All right. And with that, counsel --

12 MS. BARNABY: Could we have a date by which they have  
13 to produce the first nine documents.

14 THE COURT: Well, I don't imagine it would take very  
15 long. Ms. Kunstler, a week?

16 MS. KUNSTLER: I'm reluctant to invoke my own  
17 vacation, but I will be out of the office. But I will work  
18 with my colleagues and see if we can make that date.

19 THE COURT: Yes.

20 MS. HENDON: Judge Moses?

21 THE COURT: Just a moment. Just a moment.

22 Just for ease of reference, until I know when things  
23 are going to be done, let's have those documents produced on  
24 Monday, by Monday, next Monday, which is also the deadline for  
25 the *in camera* submissions and the letters on the document.

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Ms. Hendon, who are you and what can I do for you?

MS. HENDON: I am Ms. Barnaby's co-counsel. I do not want to take more than 60 seconds. I wanted to request that we raise a housekeeping matter so we don't have to reconvene tomorrow, for the Court's consideration, and it's this: Last weekend on the Court's docket Mr. Kauder made a motion to quash one of defendants' subpoenas. Mr. Kauder and defendants fully briefed that, and plaintiff, who had not objected to the subpoena and had eschewed an interest in the evidence underlying that subpoena, put in a letter, unauthorized. We wrote a letter to the Court asking that the Court either allow us until tomorrow to respond to what became a kind of final word on all matters from plaintiff with respect to a counter defendants' motion to quash, or that the Court respectfully strike plaintiff's letter, something I do not expect the Court to do. Because we had asked for until tomorrow to respond to that letter briefly, we would have to call chambers and bother your staff and get everyone on the phone to have this conversation. You may not be in a position to answer --

THE COURT: Okay. You can have until tomorrow to put in a letter, but that doesn't mean I'm going to take either that letter or the prior letter. I'm simply allowing you to file the matter. You can put it in tomorrow, and then I'm going to decide what I'm actually going to read, okay?

MS. HENDON: Thank you.

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THE COURT: Thank you very much.

ALL COUNSEL: Thank you, your Honor.

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